BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY J. SIMMONS	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,887
SIM PARK GOLF COURSE	)	
Respondent	)	
AND	)	
	)	
NORTHWESTERN NATIONAL CASUALTY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Kansas Workers Compensation Fund appeals from an Award entered by Administrative Law Judge Shannon S. Krysl dated August 23, 1995.

APPEARANCES

Claimant appeared by his attorney, Gary A. Winfrey of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James Cline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Scott J. Mann of Hutchinson, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

ISSUES

This is a second appeal from the Award in this case. The first appeal was filed by the claimant after the Administrative Law Judge found claimant's bilateral carpal tunnel syndrome did not arise out of and in the course of his employment. In the first appeal the Appeals Board noted the parties had stipulated that claimant's carpal tunnel syndrome arose out of and in the course of his employment. The Board, therefore, reversed and

remanded the claim to the Administrative Law Judge for findings on other disputed issues. On August 23, 1995, the Administrative Law Judge entered her Award on remand, finding claimant suffered a forty-one percent (41%) work disability and assessing all benefits against the Kansas Workers Compensation Fund. In this appeal from the August 23, 1995 Award, the Fund raises the following issues:

(1) Whether the respondent or Fund should be allowed to withdraw the stipulation that claimant's bilateral carpal tunnel syndrome is compensable. Or in the alternative, whether claimant is estopped or has waived the right to rely on the stipulation by failing to contemporaneously object to evidence regarding the compensability of the claim;

(2) Whether claimant's bilateral carpal tunnel condition did arise out of and in the course of his employment;

(3) Nature and extent of claimant's disability, if any; and

(4) Whether claimant should be limited to medical expenses only on the basis of K.S.A. 1992 Supp. 44-510(c) because he was not disabled from employment for one full week.

The Fund initially listed the Fund's liability for the benefits as an additional issue. At the time of oral argument this issue was withdrawn.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties the Appeals Board finds and concludes as follows:

(1,2) The parties should be considered bound by their stipulation and there remains, therefore, no issue to be determined regarding whether claimant's injury arose out of and in the course of his employment.

After the Appeals Board found, by Order dated March 30, 1995, that the parties had stipulated to compensability of the claim, the claim was remanded to the Administrative Law Judge for further findings on the remaining disputed issues. Respondent and Fund, thereafter, moved for an order of the Administrative Law Judge allowing withdrawal of the stipulation. Under the current appeal the Fund argues that the Administrative Law Judge erred in refusing to allow the stipulation to be withdrawn. The Appeals Board disagrees. As indicated in the original decision by the Board, stipulations may be withdrawn if good reason is shown for doing so and the opposing party has the opportunity to present evidence on the issue in question. Morrison v. Hurst Drilling Co., 212 Kan. 706, 512 P.2d 438 (1973). The motion must, however, be made to the Administrative Law Judge at the time of the original case in chief, not after the record is closed, a decision made and an appeal taken.

Failure to make timely objection to evidence relating to compensability also does not, in this case, act as a waiver and the Appeals Board finds claimant should not be estopped from relying upon the stipulation. The evidence in question relates to whether claimant's job or duties included playing golf. The evidence did not, in this instance, relate only to compensability of the claim. There were other aspects of the employment which might have been understood to have been a factor in causing the carpal tunnel. Playing

golf, or compensation for playing, might also have been relevant to the claimant's average weekly wage. In addition, and perhaps more importantly, the opposing party must be free to rely on stipulations of compensability unless and until leave is granted to withdraw the stipulation. The Appeals Board, therefore, finds that the parties should be and are bound by the stipulation that claimant's bilateral carpal tunnel condition is a compensable work-related injury.

(3) Except for the period during which claimant continued to work at a comparable wage, the Appeals Board agrees with and affirms the finding that the claimant has a forty-one percent (41%) permanent partial general disability. For the period claimant continued to work for respondent at a comparable wage the benefit should be based on a fourteen percent (14%) functional impairment to the body as a whole.

Claimant experienced the recurrence of carpal tunnel symptoms in late 1992 and early 1993. He had undergone bilateral carpal tunnel surgery in 1979 at a time when he worked as a meat cutter. He attributed the reoccurrence of the symptoms primarily to the golf. He testified he was expected to play as a golf course manager.

The Fund argues that even if, as was stipulated, the injury did arise out of and in the course of employment, the evidence does not warrant the finding claimant sustained any additional permanent impairment from his employment. The Fund's argument rests in large part upon the testimony of Dr. Eyster. Dr. Eyster had performed the bilateral carpal tunnel releases in 1979. He also examined and treated the claimant in 1993 when the symptoms returned. Dr. Eyster had rated the claimant in 1979 as having a three percent (3%) permanent partial impairment to the right arm. Dr. Eyster did not, in 1979, recommend any restrictions. He also did not recommend any restrictions following the current complaints. Dr. Eyster concluded and testified that claimant suffered no additional permanent impairment from his work for respondent.

Claimant's testimony, however, suggests claimant's condition did worsen as a result of his golfing activities. He testified that after his surgery in 1979, he returned to meat cutting and construction work. Neither, according to claimant, caused return of any symptoms. He currently, however, experiences problems with his hands going to sleep especially in the mornings. He testified that he has no strength left in his hands. He loses his grip on the golf clubs as a result of the symptoms, thereby reducing dramatically his golfing activities. Claimant continued to work for respondent but reduced his golfing time until the golf course was sold to another owner and claimant was terminated in March 1994. Shortly thereafter he began working for the City of Wichita doing maintenance work on the golf course. He testified that he worked there from sometime in March 1994 through August 1994. He left his work for the City because of the injuries, including the problems he was having with his hands.

The Appeals Board finds and concludes claimant did sustain additional disability. In addition to claimant's testimony, this conclusion is also supported by the testimony of Dr. Ernest R. Schlachter. Dr. Schlachter examined claimant on January 24, 1994. From the history given and his findings on examination, Dr. Schlachter concluded claimant did sustain additional permanent impairment. He testified claimant has, in his opinion, a twelve percent (12%) permanent partial impairment of function of each upper extremity or fourteen percent (14%) permanent partial general disability to the body as a whole. Dr. Schlachter also testified that, in his opinion, claimant would have had a ten percent (10%) permanent partial impairment of function to each upper extremity as a result of the surgical release as performed in 1979. Dr. Schlachter also recommended claimant engage in no repetitive pushing, pulling, twisting or grasping motions with either arm or hand, no

single lifting of more than fifteen (15) pounds and no repetitive lifting greater than ten (10) pounds. Dr. Schlachter further recommended that claimant not work with vibratory tools or in cold environments.

Karen Terrill, a vocational rehabilitation counsellor and consultant, testified regarding the effect of claimant's injuries on his ability to obtain employment in the open labor market and his ability to earn wages comparable to those he was earning in his employment for respondent. She concluded that claimant has a sixty-five percent (65%) loss of labor market access based upon the restrictions recommended by Dr. Schlachter. She further concluded that he had a zero (0) to seventeen percent (17%) loss of ability to earn a comparable wage. Her opinion on claimant's ability to earn a comparable wage was based, in part, on a comparison to the five dollars and seventy-five cents ($5.75) per hour claimant earned in his employment for the City after he left his employment for respondent. The Administrative Law Judge concluded claimant has a seventeen percent (17%) loss of ability to earn a comparable wage and a sixty-five percent (65%) loss of ability to obtain employment in the open labor market. By giving each factor equal weight, she concluded claimant has a forty-one percent (41%) work disability. The Appeals Board agrees with this analysis and the conclusions reached. The Appeals Board, therefore, affirms the findings claimant sustained a forty-one percent (41%) permanent partial general disability.

The Appeals Board notes the Administrative Law Judge's Award indicates the parties stipulated to a period of accident from December 1992 to June 1993. The Administrative Law Judge, however, commences benefits December 28, 1992. The Appeals Board acknowledges that claimant curtailed some of his work activities for respondent, but he left employment because he was terminated as a part of a change in ownership, not because of his injury. The decision in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), does not, therefore, require that the last date worked be treated as the date of accident. Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). The Appeals Board will, therefore, use the last stipulated date, June 1993. Claimant continued to work for respondent and its successor owner at the same rate of pay through March 1994. During that period the presumption of no work disability applies. K.S.A. 1992 Supp. 44-510(e).

Based upon the opinion of Dr. Schlachter and, after finding claimant's condition has been aggravated, the Appeals Board finds claimant is entitled, from June 30, 1993 to March 31, 1994, to benefits for permanent partial disability based on a fourteen percent (14%) permanent partial impairment of the whole body.

(4) The Fund also argues the Award should be limited to medical expenses only because claimant was not disabled from employment for a full week, citing K.S.A. 1992 Supp. 44-501(c). This issue was not, however, raised before the Administrative Law Judge. The issue will be not considered when raised for the first time on appeal. Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966); Davis v. Joe Ward Construction Co., 197 Kan. 589, 419 P.2d 918 (1966)

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated August 23, 1995 is hereby modifies as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant,

Larry Simmons, and against the respondent, Sim Park Golf Course, and the insurance carrier, Northwestern National Casualty, and the Workers Compensation Fund, for an accidental injury sustained on June 30, 1993.

The claimant is entitled to 39.14 weeks at $39.85 or $1,559.73 for a 14% permanent partial general body disability, from June 30, 1993 to March 31, 1994. Thereafter claimant is entitled to 375.86 weeks at $116.70 per week or $43,862.86 for a 41% permanent partial general body disability, for a total award of $45,422.59.

As of February 9, 1996, there would be due and owing to the claimant 39.14 weeks permanent partial compensation at $39.85 per week in the sum of $1,559.73 and 97.29 weeks at $116.70 per week or $11,353.74 for a total of $12,913.70 which is ordered paid in one lump sum less any amounts previous paid. Thereafter, the remaining balance in the amount of $32,509.12 shall be paid at $116.70 per week for 278.57 weeks or until further order of the Director.

Claimant is further entitled to unauthorized medical up to the statutory maximum.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Respondent and Workers Compensation Fund to be paid direct as follows

Deposition Services	
Deposition of Ernest R. Schlachter, M.D.	$254.80
Transcript of Proceedings	$ 70.00
Regular Hearing Transcript	$397.40
Deposition of Karen Crist Terrill	$163.60
Deposition of Auggie Navarro	$247.00
Don K. Smith & Associates	
Deposition of Robert L. Eyster, M.D.	$144.25

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary A. Winfrey, Wichita, KS
James Cline, Wichita, KS

Scott J. Mann, Hutchinson, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director